No. 3048

IN THE

United States

Circuit Court of Appeals

For the Ninth Circuit.

DANIEL M. KELLY,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

SUPPLEMENTAL BRIEF OF PLAINTIFF IN ERROR.

Upon Writ of Error to the United States District Court of the District of Montana.

L. O. Evans, Butte, Montana,
W. B. Rodgers, Butte, Montana,
W. T. Pigott, Helena, Montana,
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Defendant in Error.

Supplemental Brief of Plaintiff in Error.

Since preparing the brief for plaintiff in error, which was necessarily somewhat hurriedly done, it has occurred to counsel for plaintiff in error that a further brief discussion of the evidence, particularly in connection with the charge that Mr. Kelly knowingly, and with a view of improperly influencing him, visited and conversed with the Juror Brown, and furnished him with liquid refreshments, will be helpful to the court in reaching its conclusion.

In our brief we have called the Court's attention to the condition of the evidence as showing that it could not be reasonably found beyond a reasonable doubt that Kelly visited and conversed with the Juror Brown in the lobby of the Placer Hotel, and that they went together to the bar at the time of the

drinking incident detailed in the evidence. In any event, there is no attempt to show that such visit or conversation was anything but casual, or was undertaken by Mr. Kelly with any ulterior purpose or result, and particularly is the proof lacking in this regard when we call to mind the crowded condition during all these times of the lobby of the Placer Hotel, and the fact that many persons were passing from there to and from the bar-room adjoining.

Whatever view may be taken of the evidence as to whether Kelly and Brown were seen conversing in the lobby, the positive evidence of Kelly and Brown is, as we have detailed it in the original brief, conclusive and uncontradicted that they did not enter the bar together, and as to the incident at the bar, and the purchasing of the drink by Kelly, the evidence is wholly lacking to support the charge in the complaint, and the finding of the court as to its willful, unlawful or criminal character.

Before the judgment of the lower court can be sustained upon this charge, the evidence must not alone show that the act was such as obstructed, or tended to obstruct, justice, but that it was done with such intent, because failure of proof of intent is as fatal as failure of proof of the act itself. It has, indeed, been held by many courts that a denial under oath of the party charged with contempt, of any such intent or purpose, is sufficient to entitle the accused to a discharge.

U. S. v. Dodge, Fed. Case No. 14,975;

See also cases cited in note to O'Flynn v. State, 9 L. R. A. (N. S.) 1119.

This rule is recognized by the Supreme Court of the United States where the question is, as to the intent of an ambiguous act. In the case of U. S. v. Shipp, 203 U. S. 563, the Supreme Court said:

> "It may be that even now, *if the sole question were the intent of an ambiguous act, the proposition would apply.* But in this case it is a question of personal presence and overt acts. If the presence and the acts should be proved there would be little room for the disavowal of intent. And when the acts alleged consist of taking part in a murder it cannot be admitted that a general denial and affidavit should dispose of the case."

There may be cited decisions apparently to the contrary, but upon examination it will be found that they are based upon acts so serious in their nature, and so plainly and necessarily injurious in results, that no presumption can be indulged but that the wrongful results were intended. But where, as in the case at bar, the act was not necessarily such as to influence the juror, and such an interference with justice might or might not be presumed from the act itself, the rule laid down by the above authorities is but reasonable; and, in view of all the surrounding circumstances, the denial by Kelly under oath should be given controlling weight.

Certainly when the casual and harmless nature of the incident in the bar is considered, there can be no presumption of wrongful intent, as the act itself was done under such circumstances and was of such casual and innocent character that no presumption,

either that any wrong was done or intended to be done, can be drawn from it.

It is undisputed that when the drink was purchased, the Juror Brown was not especially invited, but was one of the large number of persons standing at the bar, among them being the United States prosecuting attorney, Mr. Wheeler, and other attorneys in the case. (See Tr., pp. 27, 270 and 271.)

The Juror Brown testified that prior to the trial, in past years, he had quite often taken drinks with Mr. Kelly when they met; that it was a practice in their section of the country, and he stated, "When we meet in town, it is, 'How-do-you-do, come and have a drink.' That is a fact. That is the practice; it is pretty near invariably, 'Come in and have a drink.' " (See Tr., p. 26.)

The Juror Brown was a man of means, of intelligence, and an old acquaintance of Mr. Kelly, and under no circumstances could it be fairly presumed that the following, in a single instance, of a custom, so common in the west, of buying a drink, would be presumed to influence him in any way. The invitation to Brown was not special; it was general and open to all in the bar, and simply included him with the United States prosecuting attorney, and others. Mr. Brown denies any idea of any attempt to influence him, or any possibility that he was influenced by the act. Mr. Kelly frankly and unhesitatingly testifies under oath to the same effect, and beyond this, it appears plainly from the evidence that Kelly, when he extended the invitation, did not have Brown in mind at all, but was merely following and recipro-

cating an invitation from somebody else at the bar, who had, in the usual way, asked everybody in the room to drink with him. After the previous drink had been purchased, Kelly did the same thing.

Under all of the circumstances and facts, how can it be found from the evidence, either that the act itself was of such importance or substance as to obstruct or tend to obstruct justice, or, beyond this, that the act in itself was of such a nature that there can be presumed therefrom a vicious or wrongful intent, denied by Kelly and by all of the circumstances and facts?

Respectfully submitted,

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